United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7346

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO :

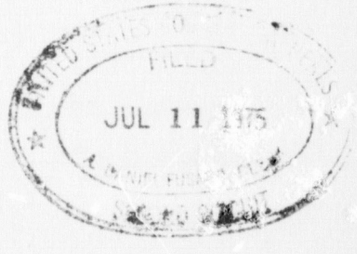
Plaintiff - Appellant :

- against - Docket No.

SAGE REALTY CORP., THE WILLIAM KAUFMAN ORGANIZATION ROBERT KAUFMAN, MELVYN KAUFMAN, ALLIED MAINTENANCE CORP. AND PRUDENTIAL BUILDING MAINTENANCE CORP. LOUIS FEIL, WILLIAM KAUFMAN, : 75/7346

Defendants -Respondents :

----------X



REPLY BRIEF OF APPELLANT

ISRAELSON & STREIT
Attorneys for Plaintiff-Appellant
521 Fifth Avenue
New York, NY 10017

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND MISC. CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Plaintiff-Appellant, -against- SAGE REALTY CORP., THE WILLIAM KAUFMAN ORGANIZATION, ROBERT KAUFMAN, MELVYN KAUFMAN, ALLIED MAINTENANCE CORP. and PRUDENTIAL BUILDING MAINTENANCE CORP., LOUIS FEIL, WILLIAM KAUFMAN, Defendants-Respondents.	Docket No. 75/7346

REPLY BRIEF OF APPELLANT

I

REPLYING TO POINT I OF THE RESPECTIVE BRIEFS OF RESPONDENTS

Each of the respondents, in Point I of their respective briefs, respond to appellant's arguments concerning the agency relationship of Cushman & Wakefield with the operators through Sage, but make virtually no reference to the contents of the agency agreement itself, Exhibit G. The agreement established the agency relationship and conferred, as appellant points out at Pages 6-7 of our first brief, very specific authority upon

the agent. The full details need not be repeated but the authority of the agent included the right to enter into agreements in the name of principal or agent at agent's discretion; the right of agent to reimburse itself for wages and union benefits of employees out of the rent monies collected on behalf of the principals, before remitting the balance to the principals semi-monthly from its special account; a provision, Paragraph 19, conferring all authority "necessary and advisable" to carry out the intent of the agreement, which must include the authority to arrange for the union benefits which the agent was entitled, as provided, to retain out of the collected rent monies of the principal. The agreement also contains general requirements that the agent's actions are subject to the control of Sage.

Respondents rely heavily upon the fact that the agreement provides that employees are to be employees of the agent and not of the principal. Here, not only is the agent authorized, but it is required to furnish the building service employees for each building as a part of its agency duties, and the agreement provides that suchoperations of the agent are "subject to the control of Sage" (Ex. G, Par. Second). Thus, clea ly the agent acts at all times in behalf of the principal and under its direction with respect to such employees.

If the foregoing were not sufficient, The Restatement of the Law of Agency (Second), Paragraph 14(n), should be controlling, in stating that one may be both an agent and an independent con-

tractor. It is submitted that if employment of employees on the agent's payroll implies an indicia of an "independent contractor" function, this does not undo the overall provisions of the agency agreement. The agreement is complete and comprehensive, and it confers upon the agent all the powers necessary to act with respect to employees who are to render services on behalf of the principal and the business of the principal as conducted pursuant to the agency agreement, including the right to enter into arrangements with unions for proper coverage of the employees, and reimbursement for the costs thereof.

Furthermore, no evidence was introduced at the hearing to the effect that those provisions of the agreement requiring approval by the principal of actions and contracts of the agent were not complied with. On the contrary, Exhibits H and I, and the testimony of Sage's Comptroller Braunstein (Tr. pp. 313-318) show that the itemized bills for RAB dues were submitted in support of reimbursement of the agent's expenses throughout the relationship of the parties.

The authority of the agent, in behalf of its principal, to enter into collective bargaining agreements with appellant through RAB membership, must follow.

Since no notice of dismissal of the agent or of withdrawal of the building from the RAB was timely given, the 1975 agreement is binding upon respondents.

II

REPLYING TO RESPONDENTS' CLAIM THAT THE CONTRACTING CLAUSE VIOLATES SECTION 8(e) OF THE NLRA, RESPONDENTS' RESPECTIVE POINTS II.

Each and every case cited by respondents in an attempt to establish a violation of Section 8(e) is based upon a so-called "union signatory" provision or arrangement. Each of these cases makes it clear that a "union signatory" clause as defined by the Court is the type of clause in which transfer or contracting is limited to companies already parties to a collective bargaining agreement with the union, i.e., permitting transfer or subcontracting only to another employer already in collective bargaining relationship with the union. Respondents collectively cite as examples of such "union signatory" clauses, Connell Construction Co. v. Plumbers & Steamfitters Local 100, ____U.S.____, 43 U.S.L.W. 4657 (June 2, 1975); Danielson v. Masters, Mates & Pilots, ____ F. 2d ____, 89 LRRM 2564 (2d Cir. 1975); NLRB v. National Maritime Union, 486 F. 2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974). In each of these cases, not only was the transfer limited to companies already under contract to the union, but in each of them, the employees required to be continued in the employment of the successor consisted of the general membership of the union to be referred from a hiring hall, and not to the specific employees already employed at the

job site. In each of these cases, it may be said that Section 8 (e) was violated because the transferor employer was limited in his "doing business" to companies already under contract with the union, and that suchrestrictions, therefore, came within the "cease doing business" proscription of Section 8(e).

In the instant case, the employer may do business with or subcontract to any company in the world; there is no restriction whatsoever on the person to whom the work may be contracted, other than conditions previously found to be lawful under the doctrine of National Woodwork Mfrs. Ass'n. v. NLRB, 386 U.S. 612 (1967). In the instant case, the requirement is merely that the very employees working at the job site be employed by the successor (Ex. 10, Art. I, Pars. 4 and 6); and that the agreement shall then be binding upon the successor.

The latter type of successorship clause has specifically been approved by the Supreme Court in Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249 (1974), in which the Supreme Court approved the enforcement of the successorship clause against the employer transferor under a collective bargaining agreement which specifically provided that it would be binding upon "successors, assigns, purchasers, lessees or transferees." The Court, at footnote 3, specifically suggested the injunctive remedy on the ground that the transferors had breached "the successorship clauses in the collective bargaining agreements."

The Supreme Court had Section 8(e) very much in mind in approving such a successor clause, since it cited, at footnote 3, the Second Circuit's decision in an earlier Commerce Tankers case, National Maritime Union v. Commerce Tankers Corp., 325 F. Sup. 360, 76 LRRM 2692 (SDNY 1971), vacated 457 F. 2d 1127, 79 LRRM 2954 (CA 2, 1972), involving 8(e).

The Supreme Court, in line with the National Woodwork doctrine, supra, was obviously saying that, where the purpose of the clause is to protect tenure and working conditions in an existing bargaining unit for employees then employed, there is no violation of Section 8(e). It is submitted that the distinction is critical, since in the Howard Johnson case, as in this case, the jobs and working conditions to be protected were those of employees already engaged in the work, whereas in the cases found violative of Section 8(e), the jobs sought to be protected were of union members generally, to be assigned from hiring halls, in a context where the transferor was restricted in its "doing business" to those already under contract with the union.

If it is relevant, the repeated assertion in the brief submitted on behalf of respondent, Sage, to the effect that Cushman & Wakefield and later Sage, retained no building employees of their own after contracting out of cleaning work, is contradicted by respondent Robert Kaufman's testimony (Tr. pp. 307-309); by the footnote at page 8 of the brief submitted on behalf of the other respondents; and by Cushman & Wakefield's Vice President, Shearer

(Tr. pp. 276-277). [See our main brief, pp. 29-30.]

As stated in our main brief, the District Court found no violation of Section 8(e), (Tr. p. 98, l. 21-22).

CONCLUSION

The decision and order of the Court below should be reversed, and a preliminary injunction entered as requested by appellant.

Respectfully submitted,

ISRAELSON & STREIT
Attorneys for Plaintiff-Appellant

Counsel:

Arnold R. Streit
Allen S. Mathers

SERVICE OF THE WITHIN NAMED REPLY BRIEF OF APPELLANT IS ADMITTED.

Dated:

Dublirer,Haydon&Straci, Esqs.
for Sage Realty Corp.

Dated:

Rosenman, Colin, Kaye, Petschek,
Freund & Emil, Esqs.
for William Kaufman Organization,
William, Robert and Melvyn Kaufman,
Louis Feil.

Dated:

Kaye, Scholer, Fierman, Hays, &
Handler, Esqs.
Prudential Building Maintenance
Corporation

Dated:

Graubard,Moscovitz, McGoldrick,
Dannett, & Horowitz, Esqs.
for Allied Maintenance Corp.

COPY RECEIVED

JUL 11 1975 @2:02 PM

ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
ATTORNEYS FOR

Copy recd [illegible]
[illegible]
7/11/75 2:25 P.M.
attys for [illegible]
[illegible]

2 COPIES RECEIVED
Date 7/11/75 2:15PM
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorney(s) for [illegible]

2 copies received
7-11-75 3:45 P.M.
[illegible]
attorney for [illegible]
By: [illegible]

1A